JD–45–03
Louisville, KY

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

HCL, INC. a/k/a A.B., INC. Case No. 9–CA–39526

and

LABORERS INTERNATIONAL UNION OF AMERICA,
AFL-CIO, LOCAL 576

Julius U. Emetu, II, Esq., for the General Counsel.
Dennis Brinley, Shawn Brinley, Pro Se,
of Louisville, Kentucky, for Respondent.
Irwin H. Cutler, Jr., Esq., (Segal, Stewart, Cutler, Lindsay, Janes & Berry, PLLC),
Louisville, Kentucky, for the Charging Party.

DECISION

Statement of the Case

ARTHUR J. AMCHAN, Administrative Law Judge. On April 9, 2003, this case was submitted to me on a stipulated record. The charge was filed August 16, 2002 and the complaint was issued November 26, 2002. The General Counsel alleges that Respondent, HCL, Inc., violated Section 8(a)(5) and (1) of the Act by refusing to sign a collective bargaining agreement with the Union, refusing the adhere to the terms of this agreement and dealing directly with its bargaining unit employees, instead of the Union, their collective bargaining representative. After considering the briefs filed by the General Counsel,[1] Respondent and Charging Party, I make the following:

Findings of Fact

I. Jurisdiction

The Respondent, HCL, Inc., a corporation, is engaged in the construction industry as an asbestos abatement contractor in Louisville, Kentucky. At its Louisville facility, Respondent annually purchases and receives goods valued in excess of $50,000 from customers located outside of the Commonwealth of Kentucky. The Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union, Laborers Local 576, is a labor organization within the meaning of Section 2(5) of the Act.

[1] I have considered both the General Counsel's original and substitute brief.

II. Alleged Unfair Labor Practices

In May or June 2001, Respondent recognized the Union as the exclusive collective bargaining representative of its employees pursuant to Section 8(f) of the Act. Thereafter, HCL signed a collective bargaining agreement with the Union, which expired on June 30, 2002. On March 4, 2002, the Union sent to signatory contractors, including HCL, a letter informing each contractor that it desired to enter negotiations for a new agreement.

On June 14, 2002, Shawn Brinley, on behalf of HCL, and Robert Strahan, Business Manager of the Union, signed the following document on the Union's letterhead:

LETTER OF INTENT

> The Employer signatory below, hereby agrees to become signatory to and be bound by the new Collective Bargaining Agreement effective July 1, 2002, which is reached by and between the Kentucky Laborers' District Council, for and on behalf of Laborer's Local Union # 576, which shall replace the current Collective Bargaining Agreement between the parties mentioned above, and shall make all monetary adjustments back to July 1, 2002.
>
> The Employer will be protected in the continuation of work in progress and any new work to be undertaken during the existence of this Letter of Intent which shall expire at the execution of the new Collective Bargaining Agreement once it is reached.

This June 14 letter does not indicate that HCL was authorizing any other employer, group of employers, employer association or other agent to bargain with the Union on its behalf.

On June 25, 2002, the Union sent a letter to all signatory contractors advising them of changes from the 1999-2002 contract and the agreement that it desired all contractors to sign. This change, which concerned the elimination of the employers' contribution to the Laborers'-Employers Cooperation and Education Trust (LECET), appears to also have been a change to an earlier draft of the 2002-2005 collective bargaining agreement.

On July 23, the Union sent a letter to all contractors who were signatory to the 1999-2002 agreement informing these employers that, "[w]e have successfully negotiated a new Building Agreement." This letter does not indicate the party or parties with whom the Union negotiated such agreement. Each employer was asked to sign a signature page and fax it to the Union. Respondent did not do so. The Union sent HCL a follow-up letter on August 1, 2002, repeating its request that it sign the signature page of the July 1, 2002-June 30, 2005 collective bargaining agreement. Shortly thereafter, Respondent held a meeting with its employees, who had been unit members under the prior contract. During this meeting HCL discussed wages, benefits and working conditions with its employees without notifying the Union.

Analysis

The Board decision controlling the outcome of this case is *James Luterbach Construction Co.,* 315 NLRB 976 (1994), which is not cited in either of the General Counsel's two briefs or in the Charging Party's brief. An employer, such as HCL, which has a Section 8(f) relationship with a union and signs a collective bargaining agreement with it, must adhere to that agreement until it expires. However, upon expiration of a collective bargaining agreement, an 8(f) employer's obligations are different than an employer whose relationship is governed by

Section 9 of the Act (i.e., where it has been established that the Union enjoys the majority support of the bargaining unit employees).

A Section 9 employer may be bound to a successor collective bargaining agreement simply by inaction, *Retail Associates,* 120 NLRB 388 (1958). Thus, where a multi-employer association bargains for a successor contract and a member of that association, whose relationship with the union is governed by Section 9, takes no action, it is bound by the successor agreement. However, the Board held in *Luterbach* that in the 8(f) context, for an employer to be bound by multiemployer bargaining, there must be more than inaction, i.e., the absence of a timely withdrawal from the employer bargaining association.

The Board enunciated a two-part test to be used in deciding whether an 8(f) employer has obligated itself to be bound by the results of multiemployer bargaining. First, the employer must be part of the multiemployer unit, and second, the employer must take a distinct affirmative step, recommitting to the union that it will be bound by the upcoming or current multiemployer negotiations, 315 NLRB 976 at pp. 979-80.

The General Counsel has failed to establish that HCL was bound to sign and adhere to the Union's 2002-2005 collective bargaining agreement. First of all, the General Counsel has failed to satisfy the first step of the *Luterbach* test. There is no evidence that HCL was a member of a multiemployer bargaining unit or that HCL had given any employer or group of employers authority to negotiate with the Union of its behalf.

The General Counsel relies on *Cowboy Scaffolding,* 326 NLRB 1050 (1998) a case in which the Board found an 8(f) employer bound to a successor agreement by its failure to repudiate the contract in a timely fashion. The *Luterbach* decision is not discussed in *Cowboy Scaffolding* and appears to this judge somewhat inconsistent. However, the instant case is distinguishable from *Cowboy Scaffolding* in that the Union notified HCL that it intended to negotiate a new agreement. Thus, under *Luterbach*, I conclude that in order for HCL to be bound by the new agreement it must have taken affirmative steps to extend its collective bargaining relationship beyond the expiration date of the 1999-2002 contract.

I find that the June 14, 2002 letter is not the sort of affirmative step contemplated by *Luterbach.* The letter implies that the negotiations involve a party representing interests similar to Respondent's. There is no evidence that any such party took part in negotiations with the Union. Further, HCL took no action after the expiration of the 1999-2002 collective bargaining agreement to extend its relationship with the Union. Neither the General Counsel nor the Charging Party argues that the June 14, 2002 letter obligated HCL to sign the collective bargaining agreement pursuant to contract law principles. I therefore decline to address such a theory.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[2]

[2] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

ORDER

The complaint is dismissed.

Dated, Washington, D.C., April 17, 2003.

Arthur J. Amchan
Administrative Law Judge